IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DUANE JONATHON KOSLOWSKI, Petitioner.	)	No. 80427-3 En Banc Filed June 18, 2009

MADSEN, J.—Petitioner Duane Koslowski maintains that his right to confrontation was violated when police officers testified about statements made to them by the victim of his charged offenses when the officers responded to a 911 call. The victim died before trial and was unavailable to testify. The question is whether the victim's statements to the officers were testimonial and, if so, whether their admission at trial was harmless error. We hold that the statements were testimonial and their admission at trial was not harmless. Accordingly, we reverse

the Court of Appeals.

FACTS

Mr. Koslowski was charged with seven crimes involving two home invasion robberies. At this stage of the proceedings, convictions for three offenses committed on November 13, 2002, are at issue. Ms. Violet Alvarez, the victim, died before trial. The State therefore sought to introduce statements she made as excited utterances and thus satisfy confrontation clause concerns under then applicable precedent, *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). The trial court granted the State's motion and the statements were admitted at Koslowski's trial.

On appeal, Mr. Koslowski argued that under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which overruled *Roberts*, admission of Ms. Alvarez's statements violated his confrontation clause rights because the statements were testimonial. In *Crawford*, the United States Supreme Court held that the confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id*. at 53-54. The Court of Appeals rejected Koslowski's argument and affirmed his convictions in an unpublished opinion but reversed the exceptional sentence that had been imposed because a judge, not a jury, had found the aggravating factors justifying the exceptional sentence. *State v. Koslowski*, noted at 130 Wn. App. 1005, 2005 WL 3753136 (*Koslowski* I), *review*

granted and cause remanded, 157 Wn.2d 1012, 138 P.3d 113 (2006).

Mr. Koslowski petitioned for review. While his petition was pending in this court, the Court issued its decision in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), which addressed the meaning of "testimonial statement." We remanded Koslowski's case to the Court of Appeals for reconsideration in light of *Davis*.[1] In an unpublished opinion, the Court of Appeals again affirmed the convictions for the crimes involving Ms. Alvarez, reasoning that her statements introduced at trial by the State were not testimonial under *Davis* and, even if they were testimonial, any error was harmless. *State v. Koslowski*, noted at 139 Wn. App. 1014, 2007 WL 1719930 (*Koslowski* II), *review granted*, 163 Wn.2d 1012, 180 P.3d 1291 (2008). Koslowski again petitioned for review, claiming that Ms. Alvarez's statements were testimonial and therefore inadmissible. We granted his petition.

The evidence submitted at Mr. Koslowski's trial and at the pretrial hearing addressing the State's motion to admit Ms. Alvarez's statements established that on November 13, 2002, Yakima Police Officers Nolan Wentz and Michael Kryger responded to a 911 call reporting the robbery. Sergeant Wentz testified that he arrived about 5:50 p.m., approximately two minutes after he was called to respond. He went to the front door, from which he could see Ms. Alvarez on the telephone

[1] The United States Supreme Court has held that *Crawford* does not apply retroactively to cases already final on direct review. *Whorton v. Bockting*, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007). *Crawford* and *Davis* apply, however, because Mr. Koslowski's case was still pending on direct review when they were filed.

with the 911 operator. She ended the call and opened the door for him. He testified that she was looking all around and was extremely emotional and very upset. Wentz testified that Ms. Alvarez started telling him what was going on right away and directed him inside, where there was a couch to the left and some white wire ties on the floor, like those used by police as temporary handcuffs. Ms. Alvarez told him the ties were used on her and she showed him where she had been forced to lie on the floor. Sergeant Wentz testified that he asked more questions about what happened and she responded. He said these questions did not take very long because he "was trying to get as much information as [he] could to give to the other officers in the field." 1 Verbatim Report of Proceedings at 113 (Jan. 13, 2003). The record does not show what questions were asked and how Ms. Alvarez answered, nor does it give the context and timing in more than general terms.

Officer Kryger testified that it took him about six or seven minutes to respond and he was the second officer on the scene. He also testified that Ms. Alvarez was very frightened. After Kryger arrived, Officer Wentz had her begin again her explanation of what had happened. The officers testified that Ms. Alvarez explained that she had been outside her home unloading groceries from her car when she saw a dark-colored foreign car drive by. The car slowed, stopped, and backed up. Three men got out of the car and approached her. According to Officer Wentz's testimony, Ms. Alvarez said that one of the men took out a gun and pushed it into her

side, and then in English told her to go into the house. Officer Kryger's account of what Ms. Alvarez said generally accorded with that of Wentz, although he testified that Ms. Alvarez had a strong belief there was a gun but he was not sure that she actually saw a gun or whether she said that she believed it was a gun rather than being certain that there was a gun.

The officers testified that once in the house, Ms. Alvarez was forced to the floor, her hands were tied, and her face was covered with a shirt. She told them that she thought the men were Hispanic because they spoke to each other in Spanish, which she also spoke. The men took her wallet, cash, credit cards, a ring removed from her finger, other jewelry, a jewelry box, a DVD (digital video disc) player, and the keys to her house and car. After she heard the men leave, Ms. Alvarez freed her hands[2] and called 911.

The officers went through the house and saw Ms. Alvarez's grocery bags knocked over and the contents of her purse spilled on the floor. They also found that someone had gone through the drawers in the master bedroom, taken the clothing out and dumped it on the floor, and moved the mattress off to the side to look underneath it. There was a pillowcase missing from the bed. The State introduced photographs showing the front room and Ms. Alvarez's purse and the contents that had been dumped out, the ties that bound her, the white t-shirt that had been used to cover her head, and the groceries. Photographs were also

[2] Officer Kryger testified that it appeared the wire ties had been incorrectly closed.

introduced that showed the master bedroom had been ransacked.

The State also introduced evidence that on the same day that Ms. Alvarez was robbed, Mr. Koslowski's roommate, Brenda Duffy, was moving out of his residence. Duffy's daughter, Heather Killion, and others, including Glenn Dockins, were at Koslowski's residence that evening to help her move. Killion testified that Koslowski and a Hispanic male friend came home later in the evening and Koslowski showed her and Duffy some credit cards. She testified the cards were obviously stolen because they had an unfamiliar woman's name on them. Killion testified that she asked Koslowski to whom the cards belonged but he did not answer. Rather, she testified, he made the gesture of a gun with his right hand and she took this to mean that Koslowski had robbed a lady, although she also testified that she did not take it seriously. Later the same evening, according to Ms. Duffy's testimony, Mr. Koslowski gave Dockins a credit card that Dockins used to buy gas.

The State introduced evidence that the next day police responded to a report of a shooting at another residence (where the second home invasion occurred that led to Koslowski's other convictions). Police located a vehicle involved in that incident and learned it was registered to Koslowski. Numerous law enforcement officers then went to his residence. While investigating the shooting and second home robbery, officers questioned individuals present at the residence. Dockins was among them, and police discovered that he had a credit card in the name of Violet Alvarez. They traced a purchase

made with the card at a gas station in Yakima the previous day and learned that Dockins had made the purchase.

The jury returned a verdict of guilty on all counts. Koslowski was convicted of first degree robbery, first degree burglary, and first degree unlawful possession of a firearm as a result of the robbery at Ms. Alvarez's home. As explained, our review involves the Court of Appeals' reconsideration of the confrontation clause issue in light of *Davis*. The only issues concern admissibility of the statements that Ms. Alvarez made to the police officers.

ANALYSIS

Mr. Koslowski argues that his confrontation rights were violated when the officers testified about the statements that Ms. Alvarez made. He contends that the statements were testimonial under the analysis in *Davis* and their admission therefore erroneous. A confrontation clause challenge is reviewed de novo. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), *cert. denied*, 128 S. Ct. 2430 (2008).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The confrontation clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford*, 541 U.S. at 51 (citation omitted). As noted above, it "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a

prior opportunity for cross-examination.'" *Davis*, 547 U.S. at 821 (quoting *Crawford*, 541 U.S. at 53-54).[3]

Ms. Alvarez's statements were made to police officers responding to a report of a crime. The Court said in *Crawford*, 541 U.S. at 52, that statements taken by police officers during interrogations[4] are testimonial. Subsequently, however, when directly addressing statements made during police interrogation that occurred when officers responded to a crime scene, the Court in *Davis* made it clear that despite the seemingly broad sweep of *Crawford*'s statement about police interrogation, not all police interrogation yields testimonial statements.[5] The Court explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

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[3] At oral argument the State agreed, as it should, that it has the burden of establishing Ms. Alvarez's statements were nontestimonial. *See, e.g.*, *United States v. Arnold*, 486 F.3d 177, 192 (6th Cir. 2007), *cert denied*, 128 S. Ct. 871 (2008); *State v. Bentley*, 739 N.W.2d 296, 298 (Iowa 2007), *cert. denied*, 128 S. Ct. 1655 (2008); *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

[4] "Interrogation" is not meant in a formal sense, but rather in a colloquial manner. *Crawford*, 541 U.S. at 53 n.4.

[5] The Court explained in *Davis* that when it said in *Crawford* that "'interrogations by law enforcement officers fall squarely within [the] class' of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826 (alteration in original) (quoting *Crawford*, 541 U.S. at 53).

Davis, 547 U.S. at 822.

Crawford involved a witness's recorded statements in response to structured police questioning at the police station after the witness had been given *Miranda* [6] warnings. *Davis* involved companion cases. *Davis* itself concerned statements made by a victim of domestic violence during the course of a 911 call to the 911 operator. In the second case, *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub. nom Davis*, 547 U.S. 813, the statements were made to officers who responded to a reported domestic disturbance. The meaning of "testimonial" was explored through the Court's comparison of the circumstances in *Crawford*, *Davis*, and *Hammon*.

When comparing the circumstances in *Crawford* with those of *Davis* itself, the Court adopted four factors that help to determine whether the primary purpose of police interrogation is to enable police assistance to meet an ongoing emergency or instead to establish or prove past events: (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant. (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency.[7] (3) What was the nature of what was

[6] *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial. (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe? *Davis*, 547 U.S. at 827.

The Court also explained that a conversation could contain both testimonial and nontestimonial statements. A conversation that begins as an interrogation to learn whether emergency assistance is needed may change and become testimonial once the emergency appears to have ended or the information necessary to meet the emergency has been obtained. *Id*. at 828.

As mentioned, the second case before the Court in *Davis*, *Hammon*, involved statements made to police officers who responded to a report of a domestic disturbance at a residence. At issue were statements made by Amy

[7] Courts have recognized that there are two ways in which an ongoing emergency may exist: first, when the crime is still in progress, and second, when the victim or the officer is in danger, either because of the need for medical assistance or because the defendant poses a threat. *State v. Shea*, 2008 VT 114, 965 A.2d 504, 508, ¶ 14. The first type occurred in *Davis* itself, where the 911 caller was reporting an ongoing crime. As to the second, in *Anderson v. State*, 163 P.3d 1000 (Alaska App. 2007), *cert. denied*, 128 S. Ct. 1486 (2008), for example, the victim was unable to move on his own or to breathe comfortably and needed medical assistance, thus an emergency existed.

Hammon. No ongoing emergency was apparent, the Court reasoned, because she told an officer when he arrived that things were fine and the officer heard no argument or crashing and saw no one throw or break anything. *Id*. at 828-29. The Court concluded that at the time the statements at issue were elicited the officer was trying to determine what had happened, not what was happening. *Id*. at 830. With regard to formality, the Court agreed that Amy's interrogation occurred under less formal circumstances than the interrogation in *Crawford*. *Id*. However, it was "formal enough that [her] interrogation was conducted in a separate room, away from her husband . . ., with the officer receiving her replies for use in his 'investigat[ion].'" *Id*. (third alteration in original). The Court explained that in both *Crawford* and *Hammon*, the declarants were separated from the defendants, "[b]oth statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed," and "both took place some time after the events described were over." *Id*. The Court said that "[s]uch statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Id*. The Court did "not dispute that formality is indeed essential to testimonial utterance," and added that "[i]t imports sufficient formality, in our view, that lies to [examining police officers] are criminal offenses." *Id*. at n.5.

Then, with regard to whether there was an ongoing emergency in *Hammon*, the Court rejected the argument that

Amy's statements were like those in *Davis*, where the declarant's statements were made during the course of a frantic 911 call seeking protection from the defendant. The Court explained that unlike the circumstances in *Hammon*, the statements in *Davis* were taken while the declarant was alone, unprotected by police, in apparent immediate danger from the defendant, and seeking aid, not relating past events. *Id*. at 831-32.

The Court rejected the implication that "virtually any 'initial inquiries' at the crime scene will" be nontestimonial but also refused to hold that *no* questions at the crime scene will yield nontestimonial answers. *Id*. at 832. In the case of domestic disputes the investigating officers will need to determine with whom they are dealing in order "'to assess the situation, the threat to their own safety, and possible danger to the potential victim.'" *Id*. (quoting *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004)). These exigencies, the Court said, "may *often* mean that 'initial inquiries' produce nontestimonial statements." *Id*. However, the Court said, where the statements are neither a cry for help nor provision of information that will enable officers immediately to end a threatening situation, it is immaterial that the statements were given at an alleged crime scene and were "initial inquiries." *Id*.

Here, Mr. Koslowski contends that there was no emergency or current crime in progress at the time Sergeant Wentz arrived at Ms. Alvarez's home, or any immediate threat to her safety. He maintains that Wentz was not seeking to determine what was happening but

rather what had happened, i.e., the purpose of the investigation and questions were to gather information and investigate a possible past crime and facts relevant to a possible later criminal prosecution. The State, on the other hand, contends that the circumstances here are more akin to a call for emergency assistance than a mere report of a crime. The Court of Appeals agreed with the State that "Ms. Alvarez was seeking help and protection from the police" and "gave the officers information to apprehend an armed suspect." *Koslowski* II, 2007 WL 1719930, at *3. The court noted that Wentz testified that he was trying to get as much information as possible to relay to officers in the field. *Id*. Under these circumstances, the Court of Appeals determined, the statements were not testimonial. *Id*.

On the limited record we have before us and applying the factors established by the Court in *Davis*, we conclude that the statements were testimonial. We say "limited record" because at the time this case was tried, *Crawford* and *Davis* had not been decided and the evidence submitted and the arguments to the trial court reflect the fact that *Roberts* controlled at the time. There is abundant evidence about Ms. Alvarez's emotional state, for example, which was highly relevant under *Roberts*. The same level of detail about circumstances that are relevant under *Davis* is lacking. For example, we do not know what questions, exactly, were asked and how they were answered, nor do we know when, in the course of the interrogation, certain questions were asked and answered, or how long a time had

elapsed when certain statements were made. This is not a matter of poor lawyering. Indeed, had this case been final when *Crawford* was decided, *Crawford* and *Davis* would not apply.

Given what the record does reveal, we begin with the first of the four factors established by the Court, whether the speaker was speaking about events as they actually occurred or describing past events. Ms. Alvarez was describing events that had already occurred. Nothing in her statements or the circumstances, as revealed by this record, indicates that the men who robbed her might return to the scene for any reason. The record shows that they had completed the robbery and left her residence and there is no evidence of any ongoing situation or relationship with Ms. Alvarez that might suggest she was still in danger from them. She had freed herself from the ties that bound her. Although the time that had elapsed was evidently short, she was describing past events and not events as they were actually happening. In contrast, the statements in *Davis* itself were taken while the 911 caller was alone, unprotected by police, and in apparent immediate danger from the defendant. She was seeking aid, not relating past events. *Davis*, 547 U.S. at 831-32.[8]

[8] The dissent distinguishes between Ms. Alvarez's "initial statements," which the dissent describes as those made immediately or shortly after the officers respective arrivals on the scene, and her other statements. Dissent at 3. The dissent concludes the "initial statements," which include references to one of the suspects having a gun, were nontestimonial, while the later statements were testimonial. The dissent says that the "initial statements" were made within minutes of the robbery. The record does not support the dissent's conclusion.

The record shows that Ms. Alvarez was tied and left on the floor of her residence.

The second factor is whether a reasonable listener would recognize that Ms. Alvarez was facing on ongoing emergency, such as in *Davis* itself where there was "plainly a call for help against a bona fide physical threat." *Id*. at 827. Here, in contrast, the statements were made after police had arrived. A reasonable listener would certainly understand that Ms. Alvarez was frightened, as she clearly was, but nothing in the record indicates there was any reason to think that she faced any further threat after the robbers left, she was able to free herself, and the police

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It does not disclose how long it took for her to free herself from the restraints used to tie her. The record also does not disclose how much time elapsed between the time the robbery occurred and Ms. Alvarez's 911 call. The dissent's analogy to the period of time that elapsed in *State v. Ohlson*, 162 Wn.2d 1, 168 P.3d 1273 (2007), where the statements at issue were made about five minutes after an assault, is pure speculation.

Moreover, we do not know whether Ms. Alvarez mentioned the gun to Officer Wentz, the first officer on the scene, prior to Officer Kryger's arrival. None of the testimony says that she did (or that she did not). We do know that after Officer Kryger arrived Wentz had her begin again her description of what had happened. We also do not know how long after Kryger arrived they were told about the gun. Given that we do not know how long it took for Ms. Alvarez to free herself and call 911, it necessarily follows that even though we know that she did mention a gun at some point (according to the officers' testimony), we have no way of knowing how much time had passed since she was robbed. The dissent's partition of the "initial" statements and later statements is artificial and unhelpful, given the lack of evidence as to the timing of events.

The dissent contends that it is inappropriate to consider whether the speaker was speaking about events as they actually occurred or was speaking about past events, saying that in *Ohlson* we adopted a '"more nuanced approach."' Dissent at 5 (quoting *Ohlson*, 162 Wn.2d at 14-15). In *Davis*, the Court twice referred to the distinction as being between "what is happening" and "what happened." *Davis*, 547 U.S. at 827 (with regard to the circumstances in *Davis*; the difference between "speaking about events *as they were actually happening*, rather than 'describ[ing] past events'" (alternation in original) (citation omitted); *id*. at 830 (with regard to the circumstances in *Hammon*; when the officer's questions "elicited the challenged statements, he was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened'"). It is obviously proper to speak of the difference in this way. However, it is not inconsistent to speak of past events in conjunction with an ongoing emergency and, in appropriate circumstances, considering all of the factors the Court identified, the fact that some statements are made with regard to recent past events does not cast them in testimonial stone.

arrived and were present to protect her. Rather, a reasonable listener would conclude that the danger had passed. *See*, *e.g.*, *State v. Kirby*, 280 Conn. 361, 386, 908 A.2d 506 (2006) (any emergency had ended because the crimes were no longer in process and the victim was protected by the police officer's presence at her home; the police officer's presence and fact that the defendant was located some miles away rendered the primary purpose of the interrogation investigatory and the victim's answers to the officers questions testimonial); *People v. Trevizo*, 181 P.3d 375, 379 (Colo. App.) (when, at the time a woman's statements were made to officers responding to a 911 call, there was no immediate threat to her, the defendant had fled the scene, and the police had control of the situation, there was no ongoing emergency and the statements were testimonial), *cert. denied*, 2008 WL 5587533 (Colo. 2008).

The State emphasizes, however, that Ms. Alvarez was distraught when she gave her statements. As the court in *Shea* noted, the fact that the victim or other complainant is distressed is not dispositive of whether an emergency exists because in some cases, like domestic assault cases, the victim may be upset long after the emergency situation has been resolved. *State v. Shea*, 2008 VT 114, 965 A.2d 504, 509, ¶ 17. In *Kirby*, 280 Conn. at 385 n.19, the court cautioned against treating a telephone report of a past violent crime where the victim was hysterical and possibly in need of medical care as showing an ongoing public safety emergency when the suspect was still at large. The court reasoned that to do so would render meaningless the Court's

distinction in *Davis* between a past crime and an ongoing emergency. *Id*. In addition, in some cases an individual's emotional state could also be more reflective of the individual person's own emotional nature than indicative of an ongoing emergency.

In short, unless the victim's emotional state is related to the *Davis* analysis, the emotional state has little relevance to the question whether the individual's statements are testimonial. The victim's emotional state might be related to the *Davis* factors if it indicates, for example, the presence of a continuing danger or if it results in informal, unstructured police interrogation. *Shea*, 965 A.2d at 506, ¶ 7. Here, the record does not support the State's position that Ms. Alvarez's emotional state showed she was seeking help within the meaning of *Davis*. The United States Supreme Court explained in *Davis* that the inquiry is whether a "reasonable listener" would conclude that the speaker was facing an ongoing emergency that required help. What is missing here is, as explained, any evidence from which to conclude that there was an ongoing emergency requiring help, such as a bona fide physical threat.[9]

[9] The dissent reasons that this factor was satisfied "until a reasonable listener, under the circumstances, would have recognized that Ms. Alvarez did not require medical assistance and that there was no reasonable threat of physical harm to her." Dissent at 5. There is nothing in *Davis* that permits a presumption that the victim was facing an ongoing emergency, much less a conclusive presumption that applies to all statements up until the point a reasonable listener would conclude that the victim was not injured or under threat of harm. As mentioned below in this opinion, and as we noted in *Ohlson*, the United States Supreme Court concluded that where the victim's statements are "'neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial

The third factor is the nature of the interrogation, i.e., what was asked and answered and whether, viewed objectively, the elicited statements were necessary to resolve a present emergency rather than learn what happened in the past. The Court in *Davis* suggested that statements might be nontestimonial if police interrogation, objectively viewed, was an effort to establish an assailant's identity so that dispatched officers might know whether they would be encountering a violent felon. The State contends that Officer Wentz asked about the assailants in order to obtain information to relay to officers in the field for the purpose of identifying and apprehending the suspects, one of whom was armed.

As noted, initial inquiries at the scene of a crime might yield nontestimonial statements when officers need to determine with whom they are dealing in order to assess the situation and the threat to the safety of the victim and themselves. *See*, *e.g.*, *People v. Bradley*, 8 N.Y.3d 124, 862 N.E.2d 79, 830 N.Y.S.2d 1 (2006) (where an officer responding to a 911 call was met at the door by a woman smeared with blood and asked her "what happened," the victim's response that the defendant had thrown her through a glass door was nontestimonial); *Shea*, 965 A.2d at 508-09, ¶ 14 (the court concluded in a domestic assault case that the officer's initial inquiries were for the purpose of determining whether an emergency existed, as shown by the minimal information sought during a very

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inquiries" is immaterial.'" *Ohlson*, 162 Wn.2d at 14 (quoting *Davis*, 547 U.S. at 832). The dissent's presumption that an ongoing emergency exists during an "initial" interrogation until it is affirmatively determined that none exists is untenable.

unstructured interview followed by the officer's search of the apartment to see if the defendant was still at the scene). But it is irrelevant that the statements were responsive to "initial inquiries" unless the statements were a cry for help in the face of an ongoing emergency or the statements provided information that would enable officers immediately to end a threatening situation. *Davis*, 547 U.S. at 832.

Here, when the officers arrived the crime had already occurred. There is no evidence suggesting that police would encounter a violent individual at the residence and no evidence that the defendant or the other men were still in the vicinity. On this record, Ms. Alvarez was not in any apparent immediate danger, nor did any other individual face a threat from the robbers.[1]

Contrary to the State's argument, the mere fact that the suspects were at large and that Sergeant Wentz relayed the information he learned from Ms. Alvarez to officers in the field is not enough to show the questions asked and answered were necessary to resolve a present emergency situation. For example, the court in *State ex rel. J.A.*, 195 N.J. 324, 949 A.2d 790 (2008), declined to find

[1] This case is thus unlike *Ohlson*, 162 Wn.2d 1, where we concluded that the circumstances of a police officer's interrogation of one victim of an assault objectively indicated that the officer's primary purpose was to enable police assistance to meet an ongoing emergency. The juvenile victim's statements to the officer were made within minutes of an assault by the defendant driving his vehicle up onto the sidewalk so close to the victims that they had to jump out of the way. Significantly, the defendant had left the scene once only to return five minutes later and escalate his behavior from yelling racial slurs to the physical assault. There was "no way to know, and every reason to believe, that Ohlson might return a third time and perhaps escalate his behavior even more." *Id*. at 18. In contrast to the circumstances in *Ohlson*, here there are no circumstances indicating that the robbers might return.

statements nontestimonial when the suspect remained at large where neither the declarant nor the victim was in danger. As the court observed, such an expansive declaration was implicitly rejected in *Davis*, where the Court commented with respect to *Davis* itself that once the abusive husband fled, ending the immediate emergency, it could be maintained that the wife's continuing statements to the 911 operator were testimonial. *Id*. at 348; *see also*, *e.g.*, *State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824 (2007) (the fact that the defendant's location is unknown at the time of the interrogation does not in and of itself create an ongoing emergency).

If merely obtaining information to assist officers in the field renders the statements nontestimonial, then virtually any hearsay statements made by crime victims in response to police questioning would be admissible—a result that does not comport with *Crawford* and *Davis*. The interrogation here involved learning about the crimes that had occurred and obtaining information to apprehend the suspects, not to acquire information necessary to resolve any current emergency.

We recognize that under some circumstances the fact that questioning concerns an at large suspect who is armed may, when considered with other evidence, indicate the interrogation is intended to resolve an ongoing emergency. In *People v. Nieves-Andino*, 9 N.Y.3d 12, 13, 872 N.E.2d 1188, 840 N.Y.S.2d 882 (2007), for example, a shooting victim had been shot in the early hours of the day and within minutes two officers arrived. One went to the victim, who was lying between two parked cars, and asked

what happened. *Id*. at 13-14. The victim responded that he had argued with the defendant and the defendant shot him. This statement was held to be nontestimonial because the inquiry was intended to deal with an ongoing emergency since, in light of the speed and sequence of events, the officer could not be certain that the assailant posed no further danger to the victim or onlookers. *Id*. at 15-16. The court reasoned that the brief inquiry was part of the officer's reasonable effort to assess what had happened and whether there was any continuing danger. *Id*. at 16.

Similarly, in *State v. Ayer*, 154 N.H. 500, 509-10, 917 A.2d 214 (2006), the interrogating officer knew only that a shooting of an unarmed victim had occurred just moments before in broad daylight and did not know whether the suspect was armed or threatening, whether he was still in or would return to the immediate area, or whether any potential witnesses or other members of the public would become targets, under chaotic circumstances filled with police, medical personnel, and bystanders. The court held that information obtained about the perpetrator through the interrogation was nontestimonial. The court did not believe that under these circumstances any rational police officer would believe the emergency had ended or that the officer's primary purpose in asking questions was to obtain evidence relevant to a possible future prosecution. *Id*. at 510; *see also United States v. Arnold*, 486 F.3d 177, 178-79 (6th Cir. 2007) (statements were nontestimonial where the witness said that the armed defendant had threatened to kill her and he was still in the vicinity),

cert denied, 128 S. Ct. 871 (2008).

Here, however, the evidence about the interrogation discloses only that one of the suspects was likely armed, without any additional evidence indicating that Ms. Alvarez, the officers, or another person, such as an onlooker or potential witness, was in danger.[11]

As to the fourth factor, it may have been that Ms. Alvarez's emotional state

[11] Viewed objectively, the facts do not support the dissent's conclusion that the third factor weighs in favor of finding the statements are nontestimonial. The dissent finds it relevant that the robbers did not know that Ms. Alvarez had called the police and that neither she nor the officers knew whether the robbers remained in the vicinity. Dissent at 8. The dissent concludes a ongoing emergency existed in light of these facts and the fact that the robbers were at large and one had a gun. *Id*. Officer Kryger testified that Ms. Alvarez explained that she told the robbers that she was not feeling well and her son was coming over, and that the robber with the gun then told the others in Spanish (in which she was fluent) that her son was coming and also told them to hurry. III Verbatim Report of Proceedings (Jan. 29, 2003) at 334-55, 347. The robbers completed the robbery and fled. They left in a vehicle and there is no evidence it was spotted in the area at the time the officers arrived or thereafter. There is no objective basis for concluding that any ongoing threat existed, and no basis for concluding that Ms. Alvarez's statements were necessary to be able to resolve any present emergency. Moreover, as mentioned, it is highly significant that the officers were present to protect Ms. Alvarez. This was also a key factor in *Hammon*, where the Court emphasized that the police separated Hammon's husband from her, when both were in the same residence. *Davis*, 547 U.S. at 830. Here, as in *Hammon*, because Ms. Alvarez was protected by the police, her statements were not necessary for the purpose of resolving any present threat.

The dissent also misrepresents our analysis, saying that in disregard of the caution in *Ohlson* that whether the perpetrators are present is not dispositive we have incorrectly focused on whether the perpetrators were at the residence or in the vicinity. Dissent at 7. We have appropriately considered whether the evidence suggests the officers would encounter *violent* individuals at the residence or in the vicinity because such evidence is highly relevant to whether a threat of harm existed. Again, our analysis follows *Davis*, 547 U.S. at 827 (viewed objectively, the nature of the questions and answers in *Davis* itself was such that the responses were necessary to resolve a present emergency, and this was "true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a *violent felon*" (emphasis added)).

caused the interrogation to be less formal than it otherwise might have been. Also, the questioning at her home was certainly less formal than the police station taped interrogation in *Crawford*. On the other hand, as the Court noted in *Davis*, a certain level of formality occurs whenever police engage in a question-answer sequence with a witness.

Finally, the State cites several cases that it urges support its position that the statements in this case are not testimonial. However, each case is readily distinguishable. First, in *State v. Reardon*, 168 Ohio App. 3d 386, 2006-Ohio-3984, 860 N.E.2d 141, the officers arrived on the scene in a residential neighborhood and saw the suspects fleeing on foot, and a 911 call had reported a home had been invaded. But there was no information establishing how many suspects there were or how heavily armed they were. The officers needed to ensure their safety and the safety of those in the neighborhood from violent men loose in the neighborhood. *Id*. at 390, ¶ 16, 391, ¶ 18. The circumstances in *Reardon* show that an ongoing emergency existed, in contrast to the circumstances here where the suspects had fled by car before the officers arrived. In *United States v. Clemmons*, 461 F.3d 1057, 1061 (8th Cir. 2006), a shooting victim was lying in front of a neighbor's house suffering from multiple gunshot wounds. The officer parked several blocks from the scene because there could be an armed suspect. *Id*. The officer's testimony established that when he spoke to the victim he was investigating his medical condition and trying to determine who the assailant was. *Id*. Under the

circumstances, there was clearly an ongoing emergency since (1) the victim had been shot and likely needed medical attention for gunshot wounds and (2) the officer did not know if the armed suspect was in the vicinity, as shown by his testimony about where he parked and why.[12]

Considering all the *Davis* factors and the rest of the analysis in *Davis*, which expressly addresses statements by a victim during interrogation by police officers who respond to a report of a crime, we conclude, on this record, that the statements were testimonial. They were made in the course of police interrogation under circumstances objectively indicating that there was no ongoing emergency and the primary purpose of the interrogation was to establish past events potentially relevant to later criminal prosecution. The State has not established the statements were nontestimonial because it has not established that the circumstances objectively indicate the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency.[13] Because Ms. Alvarez

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[12] In *Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004), also relied upon by the State, the court applied its understanding of the analysis to be used to determine what constitutes a testimonial statement based on its understanding of *Crawford*, but the analysis is inconsistent with *Davis*.

[13] The State maintains that nothing in *Davis* changed the law regarding law enforcement's response to emergency situations, and contends that the Court of Appeals correctly analyzed the issue of admissibility of Ms. Alvarez's statements in its original opinion. *Koslowski* I, 2005 WL 3753136 at *13. The State asks this court to follow that analysis, which focused on the *witness's* purpose and understanding in initiating police contact and making the statement(s) at issue. The analysis originated in comments in *Crawford* setting out possible formulations of testimonial statements, none of which the Court in fact adopted. The Court of Appeals' original opinion also relies heavily on two cases that are no longer sound law, *State v. Mason*, 127 Wn. App. 554, 126 P.3d 34 (2005), *aff'd on other grounds*, 160 Wn.2d 910, and the state court decision in *Hammon* that was reversed

was unavailable to testify and Mr. Koslowski had no prior opportunity for cross-examination, admitting the officers' testimony about her statements at trial violated his right to confrontation.

Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error test. *Lilly v. Virginia*, 527 U.S. 116, 139-40, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999); *Mason*, 160 Wn.2d at 927. If the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. *Id*.; *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Mr. Koslowski was convicted of first degree robbery, first degree burglary, and first degree unlawful possession of a firearm. To uphold each of these convictions, we would have to find overwhelming, untainted evidence that Mr. Koslowski was armed.[14] The State argues that there is such evidence, relying on

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by the United States Supreme Court in *Davis*, *Hammon*, 829 N.E.2d at 458, *re'd*, *Davis*, 547 U.S. 813.

Davis sets out a different analysis, which must be applied to determine whether the statements at issue in this case are testimonial (as the Court of Appeals recognized on reconsideration). The four-factory inquiry as well as the rest of the analysis in *Davis* does not turn on the purpose and understanding of the victim/witness whose statements are at issue, and whatever else might be said of *Crawford*, the formulations of possible approaches to what constitute "testimonial statements" appearing in it do not take precedence over *Davis*.

[14] The unlawful possession conviction necessarily rests on the jury having found Koslowski was armed. *See* RCW 9.41.040. The to-convict jury instruction regarding first degree robbery directed the jury that to convict of this crime it would have to find that Koslowski was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon during commission of robbery. Clerk's Papers (CP) at 54; *see* RCW 9A.56.200(1). The to-convict instruction for burglary required that to convict of first degree burglary the jury had to find either that Koslowski was armed with a deadly

Ms. Killion's testimony that when she asked Koslowski to whom the credit cards belonged that he displayed to her and her mother, he did not answer but made the gesture of a gun with his right hand, and evidence that Koslowski attempted to rob another person with a firearm the following day. We disagree with the State and conclude that this is not overwhelming evidence that Koslowski was armed at the time of the crimes involving Ms. Alvarez and therefore there is not overwhelming, untainted evidence necessarily leading to a finding of guilt of first degree robbery, first degree burglary, and first degree unlawful possession of a firearm. Accordingly, these convictions must be reversed.

CONCLUSION

Under *Davis*, a witness's statements are nontestimonial when made in the course of a police interrogation under circumstances that objectively indicate the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Where the witness is the victim of a crime, the fact that the

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weapon or that he assaulted a person during commission of the burglary. CP at 69; *see* RCW 9A.52.020. As is necessary for firearm enhancements, special verdict forms were submitted to the jury for determinations whether the offenses were committed while Koslowski was armed. The jury found by special verdict form that Koslowski was armed at the time he committed robbery. CP at 34. Another special verdict form shows that the jury found that Koslowski was armed with a firearm at the time he committed the burglary involving Ms. Alvarez, CP at 32, which, in addition to justifying a firearm enhancement, also necessarily establishes one of the two alternate means by which burglary can be committed in the first degree. We have no way of knowing, however, whether the jury's determination of guilt on the first degree burglary charge was actually based on Koslowski being armed or on Koslowski's having assaulted Ms. Alvarez and, if assault, the nature of the assault.

victim is fearful and seeks police assistance is not, in and of itself, enough to establish an ongoing emergency, i.e., the determination is not made based on the perceptions of the victim. Here, Ms. Alvarez's assailants had fled the scene in a car before police arrived and there is no evidence suggesting they might return or that they posed any further danger to any identifiable person. The emergency had passed. Instead, the circumstances show that the primary purpose of the police interrogation was to establish past events potentially relevant to later criminal prosecution. Therefore the statements were testimonial.

The confrontation clause bars admission of testimonial statements of a witness who does not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. Because Mr. Koslowski had no prior opportunity for cross-examination, the admission of Ms. Alvarez's statements was constitutional error. This error was not harmless because without admission of these statements, there is not overwhelming, untainted evidence that Koslowski was armed at the time he committed the offenses involving Ms. Alvarez.

The Court of Appeals is reversed and this matter is remanded for further proceedings consistent with this opinion.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR:

Justice Susan Owens

Justice Mary E. Fairhurst

Justice Debra L. Stephens

Justice Tom Chambers